The following constitutes the order of the Court.

Signed February 23, 2005.

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
BILLY THOMAS,	§	CASE NO. 03-38389-SAF-7
D E B T O R.	§	
	§	
FIDEL CEBALLOS and ELIZABETH ARRENDONDO,	§	
PLAINTIFFS,	§	
	§	
VS.	§	ADVERSARY NO. 04-3562
	§	
BILLY THOMAS,	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER

Fidel Ceballos and Elizabeth Arrendondo, the plaintiffs, move the court for summary judgment pursuant to Fed. R. Civ. P. 56(b), made applicable by Bankruptcy Rule 7056, on their non-dischargeability complaint against Billy Thomas, the defendant. The plaintiffs contend that a state court judgment, "stemming from a finding of fraud," precludes relitigation of the issue in this court. Based on the state court judgment, the plaintiffs

assert that they are entitled to a summary judgment declaring the debt non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).[1] Thomas responds that the state court judgment does not preclude litigation of dischargeability of the debt by this court. The court conducted a hearing on the motion on January 31, 2005.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus. Inc., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Id. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that

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[1]The complaint also alleges that the debt is non-dischargeable under 11 U.S.C. § 523(a)(4). The summary judgment motion does not present a basis for a judgment under § 523(a)(4).

there is no genuine issue of material fact. Celotex, 477 U.S. at 323. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

Invoking the doctrine of collateral estoppel, the plaintiffs contend they are entitled to judgment as a matter of law.

According to the complaint, in March 1999 a fire destroyed the plaintiffs' home. Thomas, a licensed adjuster, offered to handle all matters related to the plaintiffs' insurance claims and help rebuild their home to its original condition. The plaintiffs' insurance company determined the house was a total loss, and agreed to pay the policy limit of $39,000 for the home along with $19,500 for the contents. Thomas and Pedro Trejo, a contractor, offered to rebuild the home to its original condition for $39,000. While the plaintiffs paid over $40,000 to Thomas and the contractor, construction on the home stopped substantially short of completion.

The plaintiffs filed suit against Thomas on July 16, 2003, in the 134th District Court of Dallas County, Texas, alleging statutory fraud, common law fraud, violation of the Texas Insurance Code, and violation of the Deceptive Trade and

Practices Act of the Texas Business and Commerce Code. On July 22, 2003, the state court orally rendered its findings of fact and conclusions of law in favor of the plaintiffs. On August 20, 2003, Thomas filed a petition for relief under Chapter 13 of the Bankruptcy Code. But Thomas did not file a suggestion of bankruptcy in the state court. On August 22, 2003, the plaintiffs submitted a proposed judgment and proposed findings of fact and conclusions of law to the state court. The court entered a final judgment on September 30, 2003. Thomas filed a motion for new trial on October 30, 2003. On December 29, 2003, Thomas filed a notice of appeal to the Texas Court of Appeals. On January 29, 2004, the appeals court abated the judgment based on the bankruptcy case.

On June 14, 2004, the court converted Thomas' Chapter 13 case to a case under Chapter 7. On September 12, 2004, the plaintiffs filed this adversary proceeding to deny the discharge of the judgment entered by the state court.

The plaintiffs seek to except the state court judgment debt from discharge under 11 U.S.C. § 523(a)(2)(A) based on a portion of the state court judgment finding a violation of certain provisions of the Deceptive Trade and Practices Act. The Deceptive Trade and Practices Act (DTPA) of Section 17.46(b) of the Texas Business and Commerce Code states in relevant part:

> (b) Except as provided in Subsection (d) of this section, the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:
> (2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
> (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;
> (12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;
> (24) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

V.T.C.A., Bus. & C. § 17.46. In support of their argument, the plaintiffs rely primarily on a transcript of the state court's findings of fact and conclusions of law and on the final judgment issued by the state court, along with deposition transcripts, affidavits, and certain other documents from the state court. On this record, the plaintiffs argue that sufficient evidence exists to support a finding of nondischargeability under § 523(a)(2)(A).

Thomas argues in response that the plaintiffs failed to offer evidence in the record to support their § 523(a)(2)(A) claims, and, accordingly, asks the court to deny the plaintiffs' motion for summary judgment. Thomas contends that, despite a finding of a violation of the DTPA, the state court did not make

any affirmative findings in its July 22, 2003, findings of fact and conclusions of law in relation to the requisite elements for nondischargeability under § 523(a)(2)(A). Further, Thomas contends that the plaintiffs have not established a connection between the elements required under § 523(a)(2)(A) and the violations of the DTPA.

Collateral Estoppel

Collateral estoppel, or issue preclusion, principles apply in bankruptcy dischargeability proceedings. Grogan v. Garner, 498 U.S. 279, 285 n. 11 (1991). "[P]arties may invoke collateral estoppel in certain circumstances to bar relitigation of issues relevant to dischargeability, although the bankruptcy court retains jurisdiction to ultimately determine the dischargeability of the debt." Gober v. Terra + Corp. (In re Gober), 100 F.3d 1195, 1201 (5th Cir.1996); see also In re Shuler, 722 F.2d 1253, 1255 (5th Cir. 1984), cert. denied, 469 U.S. 817 (1984); Matter of Schwager, 121 F.3d 177 (5th Cir. 1997). The preclusive effect given to state court judgments under collateral estoppel is a function of the full faith and credit statute. Garner v. Lehrer (In re Garner), 56 F.3d 677, 679 (5th Cir.1995) (citing 28 U.S.C. § 1738 ("[J]udicial proceedings of any court of any [State] ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage

in the courts of such State ... from which they are taken.")). A bankruptcy court's decision to give preclusive effect to a state court judgment is a question of law. Gober, 100 F.3d at 1201; Garner, 56 F.3d at 679.

To determine whether issue preclusion applies, the court must look to the rules of issue preclusion in the state of the underlying judgment. See Kremer v. Chemical Constr. Corp., 456 U.S. 461, 482 (1982). Because the judgment in the present case was entered by a Texas state court, Texas rules of preclusion apply. See Garner, 56 F.3d at 679, n. 2. "Under Texas law, collateral estoppel 'bars relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based upon the same cause of action.'" Id. at 679 (quoting Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex.1984)); accord Gober, 100 F.3d at 1201. The elements of collateral estoppel under Texas law are: (1) the facts sought to be litigated in the second action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action. Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984).

Collateral estoppel, or issue preclusion, is more narrow than *res judicata* in that it *only precludes the relitigation of identical issues* of fact or law that were actually litigated and essential to the judgment in a prior suit. Van Dyke v. Boswell, O'Toole, Davis & Pickering, 697 S.W.2d 381, 384 (Tex. 1985); Tarter v. Metropolitan Savings & Loan Ass'n, 744 S.W.2d 926, 928 (Tex. 1988). Additionally, under Texas law, "preclusion includes the inherent issues or elements necessary to establish the claim." Samedan Oil Corp. v. Louis Dreyfus Natural Gas Corp., 52 S.W.3d 788, 794 (Tex. App.--Eastland 2001, pet. denied).

The party asserting issue preclusion bears the burden of bringing forward an adequate state-court record. Sysco Food Servs., Inc. v. Trapnell, 890 S.W.2d 796, 801-02 (Tex. 1994). A full state-court record is not always required for the bankruptcy court to apply issue preclusion. Matter of King, 103 F.3d 17, 19 (5th Cir. 1997); In re Davis, 3 F.3d 113, 114-15 (5th Cir. 1993). The record must, however, provide a sufficient basis upon which the bankruptcy court may determine that the issue to be decided was actually litigated and necessarily decided in state court. See In re Allman, 735 F.2d 863, 865 (5th Cir.) (citations omitted), cert. denied, 469 U.S. 1086 (1984).

Issue preclusion will prevent a bankruptcy court from determining dischargeability issues for itself only if "the first

court has made specific, subordinate, factual findings on the identical dischargeability issue in question ... and the facts supporting the court's findings are discernible from that court's record." In re Dennis, 25 F.3d 274, 278 (5th Cir. 1994) (citations omitted), cert. denied, 513 U.S. 1081 (1995). Thus, for this bankruptcy court to apply collateral estoppel or issue preclusion in nondischargeability litigation, the identical elements that constitute the § 523(a)(2)(A) claim must have been decided in the underlying litigation, either expressly or as an inherent element of the claim. If the state court decision lacks the specificity to address each element of the § 523(a)(2)(A) claim, the bankruptcy court cannot declare the judgment debt nondischargeable without making additional factual findings from an evidentiary record made before it. See In re Miller, 156 F.3d 598, 606 (5th Cir. 1998) cert. denied, 526 U.S. 1016 (1999).

The record from the state court proceedings provided by the plaintiffs demonstrates by inference that both parties fully and fairly litigated their claims and defenses in the prior action. Specifically, the state court record establishes that the plaintiffs' DTPA claim was litigated and decided. The issue that remains, however, is whether the DTPA issues litigated in the state court are identical to the § 523(a)(2)(A) claim before this court.

Section 523(c)(2)(A)

Section 523(a)(2)(A) excepts from the debtor's discharge any debt "for money, property, services, or an extension, renewal, or refinancing of credit" to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. ll U.S.C. § 523(a)(2)(A).

To except a debt from discharge under § 523(a)(2)(A) the plaintiffs must establish by a preponderance of the evidence that: (1) the defendant made a representation; (2) it was knowingly false; (3) it was made with the intent to deceive the plaintiffs; (4) the plaintiffs actually and justifiably relied on it; and (5) the plaintiffs sustained a loss as a proximate result of its reliance. Grogan v. Garner, 498 U.S. at 287.

“The operative terms in § 523(a)(2)(A), ... 'false pretenses, a false representation, or actual fraud,' carry the acquired meaning of terms of art ...[and] are common-law terms.” Field v. Mans, 516 U.S. 59, 69 (1995); see also In re Mercer, 246 F.3d 391 (5th Cir. 2001). When defining the elements of nondischargeability under § 523(a)(2)(A), the Fifth Circuit has distinguished between actual fraud on the one hand, and false pretenses and representations on the other. See RecoverEdge L.P. v. Pentecost, 44 F.3d 1284, 1292-93; Bank of La. v. Bercier (In

re Bercier), 934 F.2d 689, 692 (5th Cir.1991). In order for a debtor's representation to be a "false representation or false pretense" under § 523(a)(2), it "must have been: (1) [a] knowing and fraudulent falsehood, (2) describing past or current facts, (3) that [was] relied upon by the other party." RecoverEdge, 44 F.3d at 1293; In re Allison, 960 F.2d at 483; see also In re Bercier, 934 F.2d at 692 ("[T]o be a false representation or false pretense under § 523(a)(2), the 'false representations and false pretenses [must] encompass statements that falsely purport to depict current or past facts.'" For actual fraud, the debtor's representation must have been a knowingly false representation with intent to deceive the creditor, who relied on it and thereby sustained a loss. RecoverEdge, 44 F.3d at 1293.

As a general matter, § 523(a)(2)(A) "contemplates [actual] frauds involving 'moral turpitude or intentional wrong; fraud implied in law which may exist without imputation of bad faith or immorality, is insufficient.'" RecoverEdge, 44 F.3d at 1292; Allison v. Roberts (In re Allison), 960 F.2d 481, 483 (5th Cir.1992) (footnote omitted); see also First Nat'l Bank v. Martin (In re Martin), 963 F.2d 809, 813 (5th Cir.1992) ("Debts falling within section 523(a)(2)(A) are debts obtained by frauds involving moral turpitude or intentional wrong, and any misrepresentations must be knowingly and fraudulently made.").

Fraud actionable under § 523(a)(2)(A) is the "positive" type. See Ames v. Moir, 138 U.S. 306, 311 (1891) ("...positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, ... and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality" (emphasis added; internal quotation marks omitted)); RecoverEdge, 44 F.3d at 1292.

To prevail under the DTPA, a plaintiff must show that (1) the plaintiff was a consumer; (2) the defendant committed, among other things, a "laundry-list" violation under DTPA § 17.46(b) on which the plaintiff detrimentally relied or any unconscionable action or course of action; and (3) the wrongful act was a producing cause of the plaintiff's economic or mental-anguish damages. Wall v. Parkway Chevrolet, Inc., 2004 WL 2415092, *5 (Tex. App.--Houston [1 Dist.] 2004). A consumer is not required to prove intent to make a misrepresentation to recover under the DTPA. Miller v. Keyser, 90 S.W.3d 712 (Tex. 2002). See also Chastain v. Koonce, 700 S.W.2d 579 (Tex. 1985)(finding a violation under § 1746(b) of the DTPA *does not* require proof of intent or knowledge or conscious indifference); Helena Chemical Co. v. Wilkins, 47 S.W.3d 486 (Tex. 2001)(a party need not prove intent to make a misrepresentation under the Deceptive Trade Practices Act.).

The required elements under the DTPA differ from those required under § 523(a)(2)(A). The state court record does not include a finding of a false representation with the intent to deceive the plaintiffs. The state court record does not establish that the fraud or false representations elements were litigated. The record does not establish a connection between the requisite elements for determining dischargeability and the findings of the state court under the DTPA. The record offered by the plaintiffs fails to establish any affirmative findings by the state court with respect to the elements of nondischarge-ability under § 523(a)(2)(A). The state court record does not establish that the state court based its DTPA judgment on elements of fraud required by § 523(a)(2)(A). The state court DTPA judgment does not necessarily include the fraud elements of § 523(a)(2)(A).

The state court record does not meet the requirements set out in Dennis. The record reflects no "specific, subordinate, factual finding" that Thomas acted by false pretenses, false representations, or actual fraud. The findings of fact and conclusions of law orally rendered by the state court on July 22, 2003, only indicate “a violation” under two provisions of the DTPA.

In sum, the state court record does not contain a specific,

subordinate factual finding that the defendant's debt was obtained by false pretenses, a false representation, or actual fraud. The elements of the DTPA violations litigated in the state court are not necessarily identical to the elements of dischargeability under § 523(a)(2)(A). On this record, the plaintiffs have not established that they are entitled to summary judgment by collateral estoppel.

Order

Based on the foregoing,

IT IS ORDERED that the motion of Fidel Ceballos and Elizabeth Arrendondo for summary judgment is **DENIED**.

###END OF ORDER###